

Attachment D

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of)	
)	
TCR Sports Broadcasting Holding, L.L.P.,)	MB Docket No. 08-214
)	
Complainant,)	
)	
v.)	File No. CSR-8001-P
)	
Comcast Corporation,)	
)	
Defendant.)	

WRITTEN TESTIMONY OF MARK C. WYCHE

I. BACKGROUND

1. My name is Mark Wyche. My business address is 4582 South Ulster Street, Suite 1340, Denver, Colorado, 80237. I am Managing Director, Bortz Media & Sports Group, Inc. ("Bortz"). Bortz is one of the preeminent sports media consulting firms in the United States and is a leader in providing planning and advisory services and implementation support to clients in the fields of media, sports, and entertainment. I direct the company's sports practice and oversee media rights assessment and valuation/negotiation efforts.
2. I have worked extensively with professional and collegiate sports teams and leagues to maximize the value of their sports and media rights. This has included working to develop, launch, and market national and regional sports networks ("RSNs"). My clients have included the Mid-Atlantic Sports Network ("MASN")¹ and numerous other RSNs, Major League Baseball ("MLB"), Major League Soccer, the National Basketball Association ("NBA"), the National Hockey League, NASCAR, the PGA Tour, the Big East Conference, the Big 12 Conference, and more than 40 major professional sports

¹ MASN is the registered trade name used by TCR Sports Broadcasting Holding, L.L.P. ("TCR"). For convenience, and unless otherwise noted, I use MASN interchangeably to refer to both MASN and TCR.

franchises. In addition, I have advised Comcast Sports Networks on various arbitration issues. I have participated directly in negotiations between RSNs and multi-channel video programming distributors (“MVPDs”), including the negotiations between MASN and Comcast discussed below.

II. CONSUMER DEMAND FOR MASN’S PROGRAMMING

3. There are several factors that indicate there is demand for MASN’s programming in each of the unlaunched areas, including the Harrisburg-Lancaster-Lebanon-York DMA (“Harrisburg DMA”) in Pennsylvania and the Roanoke-Lynchburg DMA and Tri-Cities DMA in Virginia.
4. MLB assigns to each of its 30 teams the television rights for certain geographical areas. Television territories are typically assigned by Designated Market Area (“DMA”) – each DMA comprising those counties whose largest share of viewing is to stations located in that same market area. It is my understanding that MLB allocates television territories (i.e., DMAs) to teams based on its determination about the team in which fans in that territory are most likely to show interest. Over the years, MLB has designated certain DMAs as the exclusive television territory of a certain team. In other instances, MLB has designated certain DMAs as a shared television territory of two or more teams.
5. The 30 MLB teams are physically located in 17 states. It is therefore common that fans in one state identify with a “home team” in another state. The television territory assigned to the Orioles by MLB includes DMAs within six states: Maryland, Delaware, Virginia, Pennsylvania, North Carolina, and West Virginia, as well as the District of Columbia. With the decision by MLB to transfer the former Montreal Expos to Washington, D.C., to become the Nationals, the Orioles agreed to share their entire television territory with the Nationals.
6. It is my understanding based on MLB allocated television territories, that the Orioles and Nationals share exclusive television rights, and thus exclusive status as home teams, throughout Virginia, including the Roanoke-Lynchburg and Tri-Cities DMAs. In the Harrisburg DMA, the Orioles and Nationals share television rights with the Philadelphia Phillies and the Pittsburgh Pirates.

7. Carriage of MASN in the unlaunched DMAs by other MVPDs is compelling and objective evidence of consumer demand for MASN's programming in those areas. DirecTV and DISH are the two major MVPDs (other than Comcast) that serve the unlaunched DMAs, and they both carry MASN throughout MASN's television territory, including within the three DMAs where Comcast has not launched MASN on all of its systems. Other MVPDs, including Cox and Ntelos, carry MASN within the Roanoke-Lynchburg DMA, and Verizon, Armstrong, and Kuhn carry MASN within the Harrisburg DMA. Comcast itself also carries MASN within certain parts of the Harrisburg DMA.
8. Comcast carries MASN on a basic or expanded basic tier on its cable systems everywhere within MASN's Territory, except in three unlaunched DMAs and some other scattered areas. This indicates that even Comcast recognizes that broad consumer demand for MASN's programming exists within its television territory. And, as mentioned above, Comcast recognizes consumer demand for MASN's programming specifically within the Harrisburg DMA by offering MASN on a basic or expanded basic tier to some – but not all – consumers there. I am not aware of any evidence produced by Comcast indicating that demand for MASN's programming in (or within portions of) the Harrisburg, Roanoke-Lynchburg, and Tri-Cities DMAs is materially different from demand in adjacent DMAs within MASN's Territory where Comcast does carry MASN.
9. It is also my understanding that Comcast has a long history of carrying Orioles games in these three DMAs (when those Orioles games were distributed via Comcast's affiliated RSN Comcast SportsNet Mid-Atlantic), which further demonstrates the high demand for MLB programming of the type MASN offers. As a result of Comcast's failure to launch MASN in the Roanoke/Lynchburg and Tri-Cities DMAs in particular, Comcast subscribers there currently lack access to any regular MLB programming, even though Comcast had a long history of carrying Orioles games in those DMAs when it owned the rights to televise those games. Comcast's failure to launch MASN on its cable systems in those markets, having carried Orioles games there for many years, makes those areas highly unusual and undermines any assertion by Comcast that its refusal to carry MASN in the Roanoke/Lynchburg and Tri-Cities DMAs is somehow based on a lack of consumer demand.

10. Demand for MASN's programming also is evidenced by competitive Nielsen ratings in the contested areas. In the Harrisburg DMA in July 2004 – the most recent period for which Orioles games were televised widely throughout that DMA – Orioles games earned a [REDACTED]. During that same period, Orioles games earned a [REDACTED] in the Roanoke-Lynchburg DMA. Based on my experience in the industry, these ratings are competitive and demonstrate demand for MASN's programming.
11. Finally, in none of my prior negotiations in 2005 and 2006 did Comcast or its representatives ever mention allegedly low demand for MASN's programming in the Harrisburg, Roanoke-Lynchburg, or Tri-Cities DMAs.

III. COMCAST HAS THE INCENTIVE TO PROTECT ITS INTERESTS FROM THE COMPETITIVE THREAT POSED BY MASN

12. In my expert opinion, Comcast's refusal to carry MASN on all its systems throughout MASN's television territory reflects an intent by Comcast to protect its own competing interests in sports programming. Preventing MASN from establishing a presence in such places as Harrisburg and Roanoke-Lynchburg in particular would benefit Comcast in two ways.
13. First, in Pennsylvania, Comcast has an interest in ensuring that MASN does not compete with Comcast's own affiliated RSN, Comcast SportsNet Philadelphia ("CSN-Philly"), which telecasts the MLB games of the Philadelphia Phillies. By refusing to carry MASN on its Harrisburg DMA systems, Comcast is able to protect CSN-Philly from the competition for advertising and other revenue presented by MASN's broadcasts of Nationals and Orioles games. Such protection inures to the significant financial benefit of Comcast, as it prevents viewers in these locations from a choice between viewing games of the Orioles and Nationals as an alternative to the Phillies. Comcast has similar interests in protecting its affiliated RSN, Comcast SportsNet Mid-Atlantic ("CSN-MA"), which it carries elsewhere in MASN's Territory. Comcast's refusal to carry MASN enables Comcast to depress interest in MASN's sports programming content in those regions. In addition, limiting MASN's reach within its television territory negatively affects MASN's ability to compete for the telecast rights to existing and future sports programming.

14. Second, Comcast has an interest in protecting its interest in out-of-market MLB games from the home team games of the Nationals and Orioles. Comcast is part of a consortium with two other major cable operators (Time Warner Cable and Cox) that is part owner of iN DEMAND and the MLB Channel.² Comcast recently entered into a deal with MLB pursuant to which Comcast agreed to continue to carry MLB's Extra Innings packages, which is a premium sports package that allows a subscriber to view a wide range of out-of-market MLB games throughout the season.³ Comcast also recently launched the MLB Channel.
15. The iN DEMAND deal provides substantial incentives for Comcast to limit MASN's subscriber reach where CSN-MA is being carried on Comcast systems in MASN's Territory that have not launched MASN. Comcast subscribers will be less likely to watch the MLB Channel and less willing to pay for Extra Innings if they already have access to 300 games played by the "home team" Orioles and Nationals. In addition, the Orioles and Nationals play, and MASN broadcasts, dozens of games against popular out-of-market teams like the Boston Red Sox, the New York Yankees, the Chicago Cubs, the Atlanta Braves, and the New York Mets. This further erodes the value of the MLB Channel and the Extra Innings package for many subscribers. For both reasons, MASN poses a significant competitive threat to the value that Comcast can hope to extract from its recent Extra Innings/MLB Channel deal.

IV. A METHODOLOGY FOR COMPARING THE LICENSE FEES OF MASN AND OTHER AFFILIATED AND NON-AFFILIATED RSNS COMCAST CARRIES

16. I understand that a key issue in this case is whether Comcast is treating MASN differently from the way it treats its own affiliated RSNS, and also whether the rates MASN is proposing to charge in the unlaunched areas are commercially reasonable. This requires a comparison of MASN's proposed rates to the rates that Comcast pays affiliated and unaffiliated RSNS both inside and outside MASN's Territory. Based on my experience, such comparison should be performed using a normalized metric that takes

² See Alphonso Serrano, *MLB to Keep "Extra Innings" on Cable* (Apr. 4, 2007), http://www.cbsnews.com/stories/2007/04/04/business/main2649774.shtml?source=RSSattr=Entertainment_2649774.

³ See *id.*

account of the quantity of marquee programming offered by each of the three RSNs. One such measure is the per-subscriber per-major-pro-event (“PSPPE”) rate charged by each RSN for its programming. This approach to valuing regional sports programming is accepted in concept within the industry and considered objective.

17. The PSPPE measure has a number of virtues. First, it is easily calculated. It can be calculated for any RSN by dividing the RSN’s annual per-subscriber license fee (or its monthly per-subscriber license fee multiplied by 12) by the total number of live major professional sporting events that the RSN televises each year. Thus, if an RSN charges \$2.00 per month per subscriber and carries 200 pro events, then its PSPPE fee is \$0.12 (or \$2.00 times 12 months, or \$24.00, divided by 200). The lower the PSPPE, the greater the value proposition offered by the RSN.
18. Second, and importantly, the PSPPE measure derives from the actual terms of carriage contracts negotiated between MVPDs and the three RSNs at issue here. As I note more fully below, willingness to pay is the best and most reliable measure of fair market value. It is therefore important to compare RSN license fees using data derived from actual contracts rather than some other means.
19. Third, the PSPPE measure is comparable across RSNs. In my experience, the mix of major professional sports that makes up an RSN’s event count is typically drawn from one of the three major professional sports leagues, including Major League Baseball, the National Basketball Association, and the National Hockey League (and, in limited instances and to a lesser degree, major college sports programming if a significant rights fee was paid to acquire it).⁴ . Moreover, it has been my experience that when calculating an RSN’s PSPPE rate, it is reasonable to give the games of each of the three major professional sports leagues equal weighting (and, if major college sports programming is to be part of the calculation, I would give it a lesser weight than the major professional sports). Because interest in any one team can vary year-to-year and sport-to-sport, the raw number of live regular season major professional sporting events that an RSN can offer is an important benchmark to industry experts in gauging the value of that RSN’s programming. It is common in the affiliate agreements I have negotiated or with which I

⁴ If the rights fee paid for college sports is not substantial, I would not attribute PSPPE value to this programming.

am otherwise familiar based on my experience within the industry for the per-subscriber fee to be conditional upon an RSN's delivery of a minimum number of live professional sporting events. Where the RSN provides greater or fewer numbers of live professional events, affiliate agreements typically provide that an MVPD pays surcharges or receives rebates. In my view, this suggests that the PSPPE approach is a reasonable tool to value regional sports programming.

20. Finally, the PSPPE measure can readily take account of variations in the per-subscriber fees that apply across the different regions or zones within an RSN's geographic programming area. Virtually all RSN carriage contracts provide for a declining fee as the distance between the particular viewing market (or contractual zone) and the team's home stadium increases. Thus, in order to compare the license fees charged by the three RSNs at issue here within the different market areas represented by the Harrisburg, Roanoke/Lynchburg, and Tri-Cities DMAs, a proper comparison can be made by isolating and comparing the PSPPE rate that each of the RSNs at issue charges in each of the viewing markets.
21. To calculate the PSPPE rate charged by MASN in the Harrisburg, Roanoke/Lynchburg, and Tri-Cities DMAs during 2008, one must divide MASN's annual per-subscriber license fee (or its monthly per-subscriber license fee, or [REDACTED], multiplied by 12) for Region 4 (which encompasses each of the unlaunched DMAs) by the 322 live major professional sporting events that MASN televises each year. Thus, MASN's PSPPE score in the Harrisburg, Roanoke/Lynchburg, and Tri-Cities DMAs during 2008 was [REDACTED]. In other words, MASN charged [REDACTED] for each live major professional sporting event it delivered.
22. Because I have not had access to the per-subscriber fees Comcast charged MVPDs for carriage of its affiliated RSNs CSN-Philly or CSN-MA in each of the three unlaunched DMAs during 2008, I am unable to perform a PSPPE calculation for those RSNs here. However, doing so merely requires implementation of the same methodology outlined above. My understanding is that MASN's economics expert, Hal Singer, has performed such an analysis for various RSNs other than MASN using this same PSPPE approach.

V. MASN'S PROPOSED CARRIAGE TERMS REFLECT FAIR MARKET VALUE

23. I have carefully reviewed the terms and conditions on which MASN has requested carriage from Comcast on the unlaunched systems throughout MASN's Territory. In my expert opinion, MASN's proposed terms and conditions are reasonable in light of industry norms.

24. Willingness to pay in the marketplace is a reliable measure of the fair market value of regional sports programming. Comcast itself has previously agreed to carry MASN on a basic or expanded basic tier on its cable systems elsewhere within MASN's Regions 3, 4 and 5 at the same per-subscriber rate at which MASN is seeking carriage on Comcast's unlaunched systems in the Harrisburg, Roanoke/Lynchburg, and Tri-Cities DMAs. Moreover, every other major MVPD in MASN's Regions 3, 4 and 5 has already agreed to carry MASN on their basic or expanded basic tier (or equivalent) at that rate. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

25. My view that MASN's carriage proposal to Comcast reflects the fair market value of MASN's programming is also informed by my involvement in the process by which MASN arrived at the rates it currently charges MVPDs, including Comcast, throughout its territory. Based on my experience in the industry and my extensive knowledge of RSN pricing throughout the country, I assisted in determining the initial rates that MASN should charge MVPDs.

26. It is also important to note that the current per-subscriber rates that MASN charges – and the rate at which MASN is seeking carriage on Comcast's unlaunched systems – are the result of repeated arm's-length bargaining with other MVPDs, including Comcast itself. In fact, during the summer of 2006, Comcast and MASN negotiated vigorously over the rates at which Comcast would carry MASN. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]. The fact that the rate at which MASN is seeking carriage was the result of vigorous arm's-length negotiation with Comcast itself necessarily establishes that those rates reflect fair market value.

27. Finally, in my view, the rate at which MASN is seeking carriage on Comcast's unlaunched systems is comparable, if not more competitive, to what other RSNs charge and MVPDs pay for comparable programming in other markets. [REDACTED]

[REDACTED] RSN programming is often attractive from the perspective of advertisers. Advertising revenue allows an MVPD like Comcast to partially recover the per-subscriber fees that it must pay to programming providers, making it easier to realize a profit.

VI. THE AUGUST 2006 CARRIAGE AGREEMENT BETWEEN MASN AND COMCAST

28. In April 2005, I helped draft a term sheet sent to Comcast setting forth proposed terms and conditions for Comcast's carriage of MASN. The term sheet sought carriage of MASN on all Comcast systems within MASN's Territory. It also contained a map that divided MASN's Territory into regional zones with corresponding fees. While I participated in a meeting with Comcast to discuss this term sheet, no agreement was reached at that time.
29. More than a year later, in late July 2006, negotiations escalated after the FCC issued two orders: one in connection with the Adelphia transaction and a second with respect to MASN's carriage complaint. As a result of the FCC's orders, it was my understanding that MASN had to decide no later than August 4, 2006, whether it would initiate arbitration against Comcast, ensuring that any negotiations between the two parties would be hurried.
30. I helped to draft a proposed term sheet for the negotiations. Again, the term sheet contemplated that Comcast would launch and carry MASN on all Comcast systems within MASN's Territory.
31. On August 2, 2006, a copy of that term sheet was sent to Comcast executives Matt Bond and Alan Dannenbaum. As with prior versions sent to Comcast, the term sheet attached a

geographic map of MASN's Territory divided into regional zones and listed per-subscriber fees that would apply within each zone. The August 2 term sheet also included a blank appendix titled "Schedule A – List of Systems," reflecting the general industry practice of permitting the MVPD (in this instance, Comcast) to provide such a list given its superior knowledge of this proprietary information.

32. It has also been my experience that the parties to an affiliate agreement expressly discuss any systems where the MVPD will not carry the RSN within its viewing territory. Nothing in the proposed term sheet sent to Comcast in advance of a scheduled August 3 conference call between MASN and Comcast suggested, let alone expressly noted, that certain Comcast cable systems were to be excluded from the agreement.
33. On August 3, 2006, I participated with other MASN representatives in a conference call with a team of Comcast representatives that included Matt Bond and Alan Dannenbaum. During the conference call, a focus of the negotiations concerned where and when Comcast would launch MASN on its cable systems within MASN's Territory.
34. During that call, I recall Mr. Bond making a multi-part proposal. Mr. Bond first said that Comcast would agree to launch [REDACTED] expanded basic subscribers within MASN's core territory by September 1, 2006; I understood these areas to include Baltimore and Washington, D.C. (in Regions 1 and 2), plus the Salisbury, Maryland area (in Region 4). Next, Mr. Bond said that Comcast had approximately [REDACTED] remaining expanded basic subscribers, and would agree to launch [REDACTED] of them – all in Regions 4 and 5 – by April 1, 2007.
35. Mr. Bond further explained that the other estimated [REDACTED] expanded basic subscribers in Regions 4 and 5 were former Adelphia cable systems that Comcast had recently acquired in Roanoke/Lynchburg and other Virginia areas. According to Mr. Bond, these systems were low-bandwidth/un-rebuilt systems that did not have sufficient capacity to carry MASN. I believed that when Comcast rebuilt these low-bandwidth Adelphia systems, they would be capable of launching MASN.
36. Except for the discussion of the former Adelphia systems in Roanoke/Lynchburg and other Virginia areas, neither Comcast nor MASN ever discussed the exclusion of any other Comcast cable systems from carrying MASN within MASN's Territory. It has

been my experience that an MVPD engaged in carriage negotiations will clearly disclose what systems it is not going to launch.

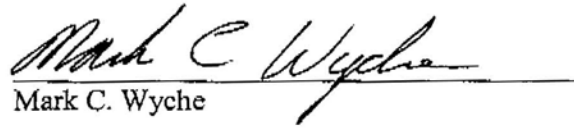
37. During the afternoon of August 4, 2006, Comcast sent MASN an email attaching an edited version of the proposed term sheet. The email assured MASN that Comcast's edits "reflect[] the deal we've been discussing over the past two days as well as some other clean-up changes." Because MASN had maintained throughout its negotiations with Comcast that it was seeking carriage on all of Comcast's systems, and because there had been no discussion of any exclusions of cable systems within MASN's Territory other than the [REDACTED] expanded basic subscribers on former Adelphia systems in the Roanoke/Lynchburg and other Virginia areas, I understood this to mean that Comcast did not omit any other systems within MASN's Territory.
38. The edited term sheet sent by Comcast stated that Comcast would launch MASN on its systems as "identified on the attached Schedule A (List of Systems)." The edited term sheet further provided that "[a]ny other Comcast systems within the MASN territory may carry the Service in Comcast's discretion." My colleague David Gluck reported to me that Comcast requested these revisions to ensure that the contract reflected the fact that the former Adelphia systems in Roanoke and Lynchburg, Virginia would not be subject to carriage of MASN under the schedule proposed by Comcast. Comcast also provided a two-page list of cable systems for the first time.
39. With limited time available, I attempted to confirm whether the "List of Systems" provided by Comcast to MASN included roughly all of Comcast's cable subscribers within MASN's Territory. It has been my experience that such an analysis is often an inexact science since an MVPD's descriptions of its cable systems and numbers of subscribers constitute proprietary information that do not always correspond to publicly available information. Thus, I did not consider it productive to attempt a system-by-system comparison of the Nielsen information and Comcast's "List of Systems."
40. Based on the public information available to me, I compared the total number of subscribers contained in the "List of Systems" to my estimates of the total number of Comcast subscribers within MASN's Territory. That comparison confirmed my then-belief that Comcast had lived up to its bargain. (Specifically, Comcast's list showed

██████ expanded basic subscribers. Adding the estimated ██████ former Adelphia expanded basic subscribers from Roanoke, Lynchburg, and other Virginia areas to this number yields the grand total of ██████. That number compared favorably to my estimates that Comcast had roughly ██████ million expanded basic subscribers within MASN's Territory.) As a result, I concluded that Comcast's "List of Systems" did not exclude any of Comcast's cable systems within MASN's Territory – except for the ██████ expanded basic subscribers on former Adelphia systems in the Roanoke/Lynchburg and other Virginia areas that Comcast had specifically discussed excluding.

41. Shortly after I reported the results of my analysis to the other members of the MASN negotiating team, the parties executed the carriage agreement.
42. It was not until several months later that MASN discovered that Comcast had not launched MASN on certain systems. Since then, I have worked with MASN to determine where Comcast is and is not carrying MASN within MASN's Territory. To date, those efforts have revealed that MASN has not been launched on Comcast systems serving approximately ██████ subscribers throughout MASN's Territory. A table representing the information Comcast has provided to MASN about those unlaunched systems is attached as Exhibit A.
43. These efforts were time-consuming and frustrating. The difficulties that MASN has endured in attempting to understand where it is and is not being carried by Comcast make plain its necessary reliance on Comcast's representations regarding its eleventh-hour edits to the term sheet and Schedule A's list of systems, as I described earlier.
44. As I've indicated previously, I did not conduct a system-by-system review in evaluating Schedule A, as in my experience this kind of review is not productive. Subsequent to the initiation of this proceeding, I have gone back to compare the 2006 Nielsen FOCUS report submitted by Comcast in this proceeding with Schedule A. This review showed discrepancies and merely confirmed my belief (based on my experience) that such comparisons between publicly available lists and lists generated by MVPDSs themselves is unproductive.

45. Both during and after the August 4 carriage agreement, both MASN and I fully believed that MASN would receive carriage from Comcast across its territory – except for approximately [REDACTED] subscribers of former Adelphia systems in Roanoke, Lynchburg, and other Virginia areas. At no time during the discussions did Comcast mention any other exclusions whatsoever, let alone any alleged concerns regarding low demand in the Harrisburg, Roanoke/Lynchburg, or Tri-Cities DMAs.
46. To be as viable as possible and to enable it to compete with existing RSNs in a regional market, an RSN needs as many subscribers as possible in its television territory. In light of the importance to MASN of reaching the most subscribers possible throughout its television territory, I would have had to obtain the approval of MASN's management to agree not to launch in that term sheet any other Comcast systems.
47. My efforts over the past year to perform a full reconciliation of all of Comcast's cable systems within MASN's Territory have also revealed that Comcast is not yet carrying MASN on its former Adelphia systems that *have* been upgraded and meet the technical requirements that Comcast said were lacking in August 2006. Comcast has refused to launch MASN on any of the upgraded systems and has not provided MASN with a timetable for launch on the upgraded or non-upgraded systems.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.


Mark C. Wyche

May 8, 2009

EXHIBIT A

REDACTED, PUBLIC VERSION